United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-4062

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

POIRIER & MCLANE CORPORATION,

Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant.

ON APPEAL FROM THE DECISION OF THE UNITED STATES TAX COURT

B
P/S

BRIEF FOR THE APPELLEE

ST. JOHN & DOUGHERTY
Attorneys for the Appellee
The Colonial Office Building
14 Vanderventer Avenue
Port Washington, New York 11050
(516) 883-1141

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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STATEMENT OF THE ISSUES PRESENTED

Subsection (f) was added to Section 461 of the Internal Revenue Code in 1964. It permits a deduction of the amount transferred for the satisfaction of a contested asserted liability where the contest exists after the time of the transfer.

By Treasury Regulation Section 1.461-2(c) the taxpayer may provide for the satisfaction of the asserted liability by

transferring property beyond his control to a trustee pursuant to a written agreement among the trustee, the taxpayer, and the person who is asserting the liability.

Appellee (hereinafter referred to as taxpayer) pursuant to a deed of trust signed by it and Manufacturers Hanover Trust Company, a professional trustee, (but not by the claimants) delivered to the trustee a certificate of deposit and seven United States Treasury Bills in the total face amount of $1,200,000.00 for the satisfaction of contested claims pending against it. Taxpayer deducted from its taxable income for the year 1964 the sum of $1,100,000.00, being the market value of the certificate of deposit, and the treasury bills (R. 30-34).

Taxpayer feels the issues presented are:

(1) whether the Tax Court in the majority opinion correctly decided that the taxpayer had, in fact, complied with the regulation (Section 1.461(c)) or, in the alternative;

(2) whether if such regulation requires that the person asserting the liability sign the trust agreement that portion of the regulation is invalid; and

(3) whether or not the Tax Court correctly held that the taxpayer had placed the property which it delivered to Manufacturers Hanover Trust Company beyond its control.

STATEMENT OF THE CASE

In 1964 the taxpayer, a corporation, was a party to a contract with the City of New York to reconstruct a portion of a subway and to enlarge a subway station. In that year it was also a party to a contract with the State of New York to build a parkway. In each of these contracts taxpayer was obligated to indemnify and hold harmless the city and the state respectively from any and all suits resulting from work performed under these contracts.

In 1964 there were pending in the Supreme Court of the State of New York suits by eight claimants against the petitioner for damages alleged to have been sustained as a result of the work performed under the contract with the City of New York in which the amount of damages claimed was $561,150.00. In that year there was also pending a suit by Bronxville-Palmer, Ltd. against the State of New York and the taxpayer wherein the claimant sought damages in the amount of $14,200,000.00 based upon the alleged negligence and trespass of the taxpayer.

The taxpayer was not insured against damages caused by trespass and the limits of the policy insuring against damages caused by negligence was $500,000.00. Acting upon the advice of its insurance agent, its accountant and its attorneys taxpayer set up a reserve of $1,100,000.00 for the payment of that pending litigation, and, on or about December 31, 1964 taxpayer

as settlor, entered into an agreement with the Manufacturers Hanover Trust Company, as trustee, to create an inter vivos trust. Pursuant to that agreement taxpayer delivered to the Manufacturers Hanover Trust Company, as trustee, securities with the market value of $1,100,000.00 which the trustee was to hold pursuant to the trust agreement for the purpose of paying the claimants whose claims were being contested when those claims were settled or resulted in a judgment against the taxpayer (R. 19-22, Joint Exhibits 2B, 3C, 4D and 5E).

The claimants, who were plaintiffs in the pending actions, were not asked to and did not sign the trust agreement, (R. 30-34, Joint Exhibit 5E). Taxpayer deducted the sum of $1,100,000.00 from its taxable income for the year 1964 pursuant to the provisions of Internal Revenue Code 1954 Section 461(f).

Between December 1964 and October 1969 all of the litigation of the claims asserted by the suitors named in the trust agreement had been finally determined. The litigation based upon negligence resulted in an award by the New York State Court of Claims on September 8, 1969 of damages in the sum of $11,600.00 which was well within the taxpayer's insurance coverage.

In October 1969 the taxpayer advised the Manufacturer's Hanover Trust Company that all the claims and suits enumerated in paragraph 2 of the trust agreement had been finally disposed of and requested that the fund be paid to it pursuant to paragraph 5 of the trust agreement. At the same time taxpayer's attorneys

gave its opinion to the trustee that the law suits enumerated in the trust agreement had been terminated and that none of the claimants enumerated in the trust agreement had any present claim against the taxpayer. Based upon the legal opinion thereupon, the trust company delivered to the taxpayer the corpus of the trust.

On the audit of the taxpayer's 1964 return the agent disallowed the deduction from taxpayer's taxable income of $1,100,000.00 the value of the property transferred to the trustee pursuant to the deed of trust upon the ground that the taxpayer had not complied with regulation Section 1.461-2(c).

Taxpayer instituted a proceeding in the United States Tax Court for a redetermination of this deficiency alleging that the commissioner erroneously determined that the taxpayer had improperly deducted the sum of $1,100,000.00 from its taxable income.

The Tax Court in the majority opinion written by the trial judge Honorable C. Moxley Featherston determined that the taxpayer had complied with the treasury regulation, and, that properly interpreted, the regulation did not require the signature of the claimant beneficiaries (R. 38-63). The concurring opinion by Judge Forrester in which Judges Fay, Sterrett, Goffe and Wiles joined, stated that such portion of the regulation Section 1.461-2(c) "Should be declared invalid if it is read

as requiring the claimant-beneficiary to sign the written agreement" (R. 63). A dissenting opinion by Judge Hall in which Judges Raum, Simpson and Quealy joined stated that the transfer did not meet the literal requirements of the regulations (R. 64-69). Both the majority and the dissenting opinions found that taxpayer had created a valid trust (R. 59-66).

SUMMARY ARGUMENT

The taxpayer properly deducted the sum of $1,100,000.00 from its 1964 taxable income. It delivered property of that value to the trustee of a trust of which the claimants enumerated in the trust agreement were the remainderman, entitled to the corpus and accumulated income for the satisfaction of their claims when adjudicated or settled, and settlor was a contingent remainderman only entitled to receive such part of the corpus of the trust, if any, which remainded after the claims of the claimants enumerated in the trust agreement had been adjudicated or settled.

I. If the regulation, in fact, requires that each person asserting a liability be a party to the trust agreement in the sense that it be a beneficiary of, and its rights be defined and protected by, the trust agreement, taxpayer had complied with the requirements of the regulation.

II. If the regulation requires that the trust agreement be signed by the person asserting a liability, the regulation is, to that extent, invalid.

III. The property which the taxpayer delivered to the Manufacturers Hanover Trust Company pursuant to the provisions of the trust agreement dated December 31, 1964 was, in fact, and in law, transferred beyond the control of the taxpayer.

ARGUMENT

I

In this case the majority opinion in the Tax Court held that the regulation, properly interpreted, does not require the signatures of the claimant-beneficiaries (R. 57). The Court noted that the statute Section 461(f) allows the deduction where, among other things, "the taxpayer transfers money or other property to provide for the satisfaction of the asserted liability" and that nothing in the language or its legislative history suggests that the person asserting the liability need sign the transfer agreement (R. 58). While the regulation (§1.461-2(c)(ii)) provides for a transfer of property to a "trustee pursuant to a written agreement (among the *** trustee, the taxpayer, and the person asserting the liability", nowhere does it say that such agreement must be signed by these parties (R. 61).

We suggest the agreement is, in fact, among the three although it is signed only by two because it fixes the rights, obligations, and interests among all those named in the trust agreement.

The trust agreement states that it "has been executed and delivered *** in the State of New York and *** shall be governed by the laws of that state" (R. 33).

In New York State trusts are created in one of two ways. An inter vivos trust, created by the settlor during his lifetime, is created by a deed of trust executed by the settlor and the trustee. A testamentary trust is created under the last will and testament of a decedent, a document signed only by the testator and by those who witnessed his signature in order to attest to the proper execution of the will. In neither instance is any other signature required yet the deed or will as the case may be defines the interest, obligations and rights among all those interested in the trust as trustee, income beneficiary, life tenant, remainderman or contingent remainderman. We respectfully refer the Court to the authorities cited in Point III.

II

If the regulations require that the trust agreement be signed by the persons asserting the liability the regulation is, to that extent, invalid.

It is the taxpayer's position that as much of the regulation as requires the person who is asserting the liability to sign the written agreement between the taxpayer and the trustee is not required by that statute, is unreasonable, arbitrary and invalid.

This portion of the regulation is invalid because: it legislates rather than regulates, it is unreasonable and impractical, it modifies the provisions of the statute, and it adds restrictions and conditions to the statute which were not contemplated by the Congress. Morrill v. Jones 106 U.S., 1 S. Ct. 423; General Electric Company v. Burton, 372 Fed. 2d 108; Miller v. Commissioner, 237 Fed. 2d 830; Royer's Inc. v. United States, 265 Fed. 2d 615; Smith v. Commissioner, 332 Fed. 2d 671; Whitney Land Company v. United States, 324 Fed. 2d 33; Boykin v. Commissioner, 260 Fed. 2d 249; Scofield v. Lewis, 251 Fed. 128; Busey v. Deshler Hotel Co. 130 Fed. 2d 187.

In Morrill, Collector, etc. v. Jones, supra, the Court said at page 424:

> "The statute clearly includes animals of all classes. The regulations seek to confine its operation to animals of 'superior stock'. This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. *** In our opinion, the object of the secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In General Electric Company v. Burton, supra, the Court said in its opinion in part, (372 Fed. 2d at p. 111),

> "*** but it is needless to say that what Congress did not do by positive enactment petitioner cannot do by regulations. Such regulations cannot amend the law."

The Court then quoted in Arkansas-Oklahoma Gas Co. v. Comm. of Internal Revenue, 201 Fed. 2d 98, as follows:

> "The Commissioner has no more power to add to the Act what he thinks Congress may have overlooked than he has to supply what Congress had deliberately omitted."

Further in the opinion the Court cited with approval the general rule as set forth in Mertens, Law of Federal Income Taxation, Vol. 1 §3.21:

> "The Treasury may not make an arbitrary or unreasonable Regulation, nor can it restrict or enlarge the scope of a statute."

In Smith v. Commr. of Internal Revenue, supra, the Court in its opinion said, (332 Fed. 2d at p. 673),

> "The Commissioner may not prescribe any regulations which are not consistent with the statute; or which may add a restriction to the statute which is not there." (underscoring supplied)

In Royer's, Inc. v. United Statesof America, supra, the Court said, (265 Fed. 2d at p. 618),

> "It seems quite clear to us that the regulation when looked at in the light of the statute, as the statute stands after

> "the 1942 amendment, does, as the taxpayer says, add an additional requirement which Congress did not put there. The regulation is, therefore, necessarily invalid."

In Acker v. Commissioner of Internal Revenue, 258 Fed. 2d 568, the Court was considering a regulation which added an additional penalty to the statute but which followed the intent expressed by the Congress in the proceedings and discussions which preceded the enactment of the statute. The Court observed that resorting to legislative history is proper where the statute is ambiguous but only where the statute is ambiguous. In its opinion the Court said at pp. 576-577,

> "While our great respect for the learning and acument of the Court of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are nonetheless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.
>
> * * *
>
> "Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither 'presumptions of validity' nor 'reenactment doctrines' can serve to validate it."

The Court in Acker cited with approval a statement in the Morrill case, supra, (106 U.S. at p. 467),

> "The secretary of the treasury cannot by his regulations alter or amend a revenue law."

LEGISLATIVE HISTORY

Section 461(f) of the Internal Revenue Code was enacted in 1964 as section 244(a) of Public Law 88-272. The section was not in the House Bill. It is an amendment added by the Senate.

The reports on the Bill are in the United States Code Congressional and Administrative News, Senate Report, No. 830, begins at page 1673; as much of the report as relates to section 244(a) §461(f) of the statute is at pages 1773-1774. The Senate Supplemental Report, which begins at page 1868, relates to section 244(a) at page 1912-1913. The Conference Report, which begins at page 1940, relates to section 244(a) at pages 1977-1978.

The floor debate on the Bill is contained in Volume 110 of the Congressional Record. The Senate floor debate is at pages 1450, 1454 and 1480. The House floor debate is at pages 3562, 3565, and further Senate floor debate is at page 3517.

Nowhere in the legislation, in the reports on the bill, or in the floor debate of the bill, is there any evidence of a Congressional intent which would require the person asserting the liability to be a party to the trust agreement under which the transfer of property was made.

The bill applies to all disputed claims whether liquidated or unliquidated.

The Senate Supplemental Report said that the new subsection (f) in the case of contested taxes, provides that the contested amount is deductible in the year of payment. After quoting the provision of the new subsection (f), the report goes on to say,

> "The new subsection (f) is not limited to an asserted liability for taxes, but applies to any asserted liability where the requirements of the new subsection (f) are met. A taxpayer may provide for the satisfaction of an asserted liability by transferring money or other property to the person who is asserting the liability or by a transfer to an escrow agent provided that the money or other property is beyond the control of the taxpayer." (underscoring supplied)

The above portion of this Senate Supplemental Report, which is not contradicted or criticized in the Conference Report or in the floor debate on the bill, clearly and definitely establishes that it was the intent of the Congress that the taxpayer would be entitled to take the deduction in the year in which the transfer was made to an escrow agent or trustee provided such transfer placed the money or other property beyond the control of the taxpayer.

In the taxpayer's case, the only possible way to comply with the Commissioner's interpretations of the statute would be (i) to transfer portions of the $1,100,000.00 to the nine (9)

named claimants who asserted the contested liabilities or (ii) to one or more escrowees or trustees pursuant to written agreement with them and with the taxpayer and nine (9) claimants asserting the liabilities (Reg. 1.461-2(c)).

There is no vehicle under New York Law for a deposit of money into Court other than in a contract action and the deposit with the Clerk of the Court must be coupled with an offer of settlement.

The Commissioner's interpretation of the regulations would leave only one route open to taxpayer. The taxpayer is "instructed" by regulation to make written agreement(s) with each of the nine claimants. The latter would have been free to demand the inclusion of various unconscionable, unfair conditions. Taxpayer could have been required to accept dictation of the terms of the escrow or trust agreement(s) imposed by the claimants under the aegis of regulation section 1.461-2(c).

Further, any claimant can arbitrarily refuse to sign the trust agreement. If compliance with regulation 1.461-2(c) requires the claimant to sign the written agreement, the claimant could prevent the taxpayer from taking the deduction provided for him by section 461(f) of the Code by arbitrarily refusing to sign any escrow or trust agreement. Surely this was not intended by the Congress.

If this regulation requires the person asserting the liability to sign the trust agreement that much thereof is unreasonable and invalid.

III

The property which the taxpayer delivered to the Manufacturers Hanover Trust Company pursuant to the provisions of the trust agreement was, in fact, and in law, transferred beyond the control of the taxpayer.

In this trust agreement the taxpayer did not reserve to itself the right to revoke the trust.

The purpose of the trust established by taxpayer and Manufacturers Hanover Trust Company is clearly established in the record (R. 21, 22, Joint Exhibit 2B R. 25, Joint Exhibit 3C, R. 27, Joint Exhibit 4D R. 29). It was the intent and purpose of taxpayer to set aside a trust fund to cover its liabilities in the trespass and negligence actions to the extent it was not covered by insurance. With respect to the trespass claims, taxpayer had no insurance and for the negligence actions, it had liability coverage of $500,000.00.

Under the provisions of this agreement, the taxpayer was the creator, and Manufacturers Hanover Trust Company, the trustee of an inter vivos trust. (There was no provision for a life estate or an income beneficiary as the agreement

provided that the income would be accumulated and reinvested.) The claimants (persons asserting a liability against taxpayer) enumerated in the trust agreement were the remaindermen. The taxpayer was the contingent remainderman. It was entitled to receive such part, if any, of the corpus of the trust which remainded upon the termination of the trust after the payment to the claimants.

The petitioner successfully defended itself against some of the claims which had been asserted against it, and disposed of others by settlement.

The last claim to be adjudicated was that of Bronxville-Palmer, Ltd. against the State of New York by the Court of Claims in September, 1969, wherein that Court awarded Bronxville-Palmer, Ltd. damages for negligence in the sum of $11,600.00, which, was less than the limits of the insurance ($500,000.00) carried by the petitioner. The decision of the Court of Claims is referred to in the appeal to the Appellate Division which is reported in Bronxville-Palmer, Ltd. v. State of New York, 39 A.D. 2d 714, 309 N.Y.S.2d 672.

Upon the happening of this event, the petitioner ceased to be a contingent remainderman and became the remainderman under the trust agreement. In October, 1969, the petitioner called upon the trustee to pay the remainder to it. Before making such payment, the trustee required the letters from the

petitioner and its counsel which are Joint Exhibits 6F and 7G to the stipulation of facts herein (R. 35 and 36) in order to assure itself that the purpose of the trust had ceased to exist, that is, it had been fully executed.

The New York Statute relating to trusts, and trustees, is Article 7 of the New York State Estates, Powers and Trusts Law (cited EPTL). While this statute did not become a law until August 2, 1966, effective September 1, 1967, it sets forth the statutory law found in the New York State Personal Property Law and the New York State Real Property Law as well as the case law, all of which was in effect on December 31, 1964, the date when the trust in question was created.

Under this statute an express trust may be created for any lawful purpose, EPTL §7-1.4. A trust may not be revoked unless the revocation is consented to in writing by all persons beneficially interested in the trust, EPTL §7-1.9. An express trust vests in the trustee the legal estate subject only to the execution of the trust and the beneficiary does not take any legal estate in the property but may enforce the trust, EPTL §7-2.1. The estate of the trustee ceases when the purpose which an express trust is created ceases, EPTL §7-2.2.

The instrument executed by petitioner and Manufacturers Hanover Trust Company completely complies with all the statutory requirements. It is a deed of trust, the vehicle used in New

York to create an inter vivos trust. The trust came into being when the deed of trust was executed by the creator and the trustee, and the property which was to constitute the corpus of the trust was transferred by the creator to the trustee with the intention of passing legal title to the trustee, (EPTL §1-2.2), in re Palumbo's Estate, 284 A.D. 834, 132 N.Y.S. 2d 386, Ihmsen's Estate 253 A.D. 472 3 N.Y.S. 2d 125, City Bank - Farmers' Trust Co. v. Charity Organization Society, 238 A.D. 720, 265 N.Y.S. 267, aff'd. 264 N.Y. 441.

The essential elements for the creation of a trust, present in this transaction between the petitioner and the Manufacturers Hanover Trust Company have been defined as follows: a designated beneficiary, a designated trustee other than the beneficiary, a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee, and the actual delivery of the fund or other property, or legal assignment thereof to a trustee, with the intention of passing legal title thereto to it as trustee, in re Goldenberg's Will, 27 Misc. 2d 425, 213 N.Y.S. 2d 225.

All of the above elements are present. The petitioner and the Manufacturers Hanover Trust Company (a professional trustee) executed the deed of trust which is Joint Exhibit 5E to the stipulation of facts (R. 30-34). Petitioner delivered to the trustee the securities enumerated in Schedule A of the trust agreement. The beneficiaries were designated in the trust agreement.

It is not necessary for the cestui que trust to be parties to the trust agreement nor even to be informend of the existence of the trust, in re George's Estate, 3 N.Y.S. 426.

In New York State, trusts are created in one of two ways. The testamentary trust is created by the will of the decedent, to which instrument only the decedent is a party. The inter vivos trust is created by a deed of trust which is in the nature of a contract between the creator of the trust and the trustee. The cestui que trust, or beneficiary, is never a party to the instrument creating the trust, whether it be the will of the decedent or the deed of trust. Yet the beneficiary is entitled to the rights, benefits and privileges given to him by the provisions of the will or the deed of trust and the trustee assumes all of the duties, obligations and responsibilities imposed upon it by the provisions of the instrument creating the trust and by the laws of the State of New York.

The nature of an estate created by a trustee is determined once and for all at the moment of the legal inception of the trust, City Bank Farmers Trust Co. v. Miller, 278 N.Y. 134.

The cestui que trust is entitled without further conveyance to have the trust enforced as an executed trust, irrespective of the cestui que trust's knowledge of the creation of the trust at the time of declaration in re Sweeney's Estate, 155 Misc. 461 279 N.Y.S. 927.

The creation of the trust, in addition to giving the cestui que a chose in action, imposes a concomitant obligation upon the trustee who, actingin a fiduciary capacity is charged with an active obligation to effectuate the ends of the trust it has accepted and to protect the interest of the cestui que trust in the trust funds, Article 4 and 77 Civil Practice Law and Rules; EPTL §7-2.4; in re Edward's Trust, 142 N.Y.S. 2d 169; Genesee Valley Trust Co. v. Newborn, 168 Misc. 703, 6 N.Y.S. 2d 498; Mixsell's Trust, 19 Misc. 2d 641, 186 N.Y.S. 2d 396; and Prudence Co. v. Central Hanover Bank & Trust, 237 A.D. 595, 262 N.Y.S. 311, aff'd. 261 N.Y. 420.

Any person who, under a trust instrument, has the right, whether present or future, or vested or contingent, to income or principal of trust fund, has a "beneficial interest" within the meaning of the Personal Property Law, §23 (now the Estates, Powers and Trust Law, §7-1.9), Schoolkopf v. Marine Trust Co. of Buffalo, 267 N.Y. 358.

Since the trustee and the taxpayer, as the creator of the trust, could not revoke or amend the trust except with the written consent of all the persons beneficially interested in the trust (§7-1.9 EPTL, supra) which included the claimants enumerated in paragraph 2 of the trust instrument, the corpus of the trust was not withdrawn by the petitioner in 1969, but

rather the trust had run its course, all of the events contemplated by the deed of trust had occurred, and the corpus was paid to the petitioner as the contingent remainderman under the deed of trust.

Where, as in the present case, the purpose of the trust had ceased, that is, the non-insurance trespass action by Bronxville-Palmer, Ltd. was finally disposed of by the Court of Appeals in 1966 and its negligence claims had resulted in an award of $11,600.00, albeit subject to its further appeal to recover its cost of repairs* (among other appealable matters not here relevant), the trustee was obligated to return the corpus to taxpayer. The purpose for the trust has ceased.

REPLY TO COMMISSIONER'S ARGUMENT

Commissioner argues (1) the transfer violated a valid requirement of the Treasury Regulations that persons asserting a liability sign the trust agreement and (2) under New York law the trust was revocable by taxpayer at will.

These arguments are answered in Points II and III supra.

The New York cases cited by the commissioner can all be distinguished. They relate to the intention of the parties to the transfer. The Courts hold, in each of the cases except the Burlenbach case, that the parties did not intend to create a trust. Contrary findings were reached in Brown v. J. P. Morgan, 265 App.

* To cover these cost of repair items the Appellate Division subsequently modified its decision to increase the award to Bronxville-Palmer, Ltd. to the sum of $14,204.36; 36 A.D. 2d 10, 318 N.Y.S. 2d 57, 63, aff'd. 30 N.Y. 2d 760, 333 N.Y.S. 2d 422 (1972).

Div. 631, 40 N.Y.S. 2d 229; Rogers Locomotive and Machine Works v. Kelley, 88 N.Y. 234. In Burlenbach the Court held that settlor retained control over the investments and the corpus would revert to settlor after 20 years, or, in the event of his death during the period of the trust, would revert to his legatees or next of kin as his property by descent and not by purchase. There being no legatees or next of kin during donor's lifetime the Court held him to be the sole beneficiary and permitted the revocation of the trust.

The intention of the parties in this case is clearly set forth in the trust agreement (R. 30-34). It clearly appears from the stipulation of facts and the exhibits thereto (R. 19-36). A valid trust was created. To this all of the judges of the Tax Court agreed (R. 52, 59, 63 and 66). The trust company was trustee, the persons asserting liabilities who were named in the deed of trust were, to the extent that any judgment recovered or any settlement agreed upon was not covered by insurance, remaindermen, and the taxpayer was a contingent remainderman entitled to the reversion of any part of the corpus remaining after the satisfaction of the contested liabilities.

Commissioner refers darkly to "secret trusts" and "tax avoidance". We have shown supra Point III that this trust was not secret. There is no tax avoidance. At most the payment of the tax may have been deferred. Where, as here, the entire corpus

of the trust fund is not required to pay the liabilities asserted against taxpayer the portion of the corpus which reverts to taxpayer is taxable income in the year it is received, Southwestern Illinois Coal Corp. v. United States, 491 Fed. 2d 1337.

Taxpayer, in its reply brief, states to the Tax Court that,

> "In its return for the year 1969, the petitioner included a statement of the fact that the sum of $1,100,000.00 had been paid to it by the trustee, but did not include that sum as taxable income because prior to making that return the respondent had disallowed the accrual and deduction in the petitioner's 1964 return and had included that sum in petitioner's income for 1964.
>
> Petitioner believes that the money paid to it by the trustee should be included in its 1969 income. It is prepared to amend its return for that year to include that payment as income as soon as there is an adjudication that petitioner's accrual and deduction in its 1964 return was proper."

Commissioner argues that the transferred property was always within taxpayer's control because the trust company transferred the remainder which reverted to the taxpayer before the award by the Court of Claims had been reviewed by the Appellate Division. The transfer of the remainder in late 1969 was the proper thing for the trustee to do with due regard to the $500,000.00 insurance coverage. The trust had existed for five years. The litigations were pending when the trust was created. The trust company knew the trust was created because taxpayer had no insurance against trespass and $500,000.00 insurance coverage

against negligence. It also knew that the last of the pending litigations resulted in a finding by the Court of Claims of negligence resulting in damages of $11,600.00, an amount which would be paid by taxpayer's insurance carrier. As is noted in Bronxville-Palmer, Ltd. v. State of New York, 36 A.D. 2d 10, 318 N.Y.S. 2d 57, mod. 30 N.Y. 2d 760, 333 N.Y.S. 2d 422, the appeal from the negligence portion of the Court of Claims 1969 decision involved minimal sums for restoration (an increase in the sum of $2,600.00). Under these circumstances the transfer of the remainder does not show that the property was at all times in the control of the taxpayer.

CONCLUSION

The decision of the Tax Court should be affirmed.

June 1976

Respectfully submitted,

EDWARD S. ST. JOHN
THOMAS P. DOUGHERTY
ST. JOHN & DOUGHERTY
The Colonial Office Building
14 Vanderventer Avenue
Port Washington, New York 11050

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

POIRIER & McLANE CORPORATION,

Appellee

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Rose Rinella, being duly sworn, deposes and says that she is over the age of 18 years, is not a party to the action, and resides at 951 East 17th Street, Brooklyn, New York, 11230

That on June 2, 1976 she served 2 copies of Brief for the Appellee on

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
ROBERT A. BERNSTEIN,
JOHN G. MANNING,

Attorneys,
Tax Division,
Department of Justice,
Washington, D. C. 20530

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

.....

Sworn to before me this
2nd day of June, 1976

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932360
Qualified in Nassau County
Commission Expires March 30, 1977